

**A The Ordinary Co Sdn Bhd v Lembaga Rayuan Negeri Selangor
& Anor**

B HIGH COURT (SHAH ALAM) — APPLICATION FOR JUDICIAL
REVIEW NO 25–167–12 OF 2012
VERNON ONG J
2 JULY 2013

C *Administrative Law — Judicial review — Power of the High Court — Principles to which a reviewing court should scrutinise decision in question — Whether reviewing court may go into merits of a decision*

D *Land Law — Conditions and restriction in interest — Conflict with local by-laws — Restriction — Conditions of land use on title — Inconsistency between restriction imposed by planning authority and conditions of land use on title — Whether condition of land use on title to prevail — National Land Code s 108*

E *Local Government — Town and country planning — Use of land and buildings — Local plan — Conflict between local plan and prior actual use of land — Conflict between land use zoning and express condition imposed under National Land Code — Whether condition of land use on title to prevail — Town and Country Planning Act 1976 s 18(3)*

G *Local Government — Town and country planning — Application for planning permission — Judicial review against refusal of planning permission — Land wrongly zoned as open space under local plan — Express condition on title stated as commercial building — Conflict between land use zoning and express condition imposed under National Land Code — Whether condition of land use on title to prevail — Whether planning application wrongly refused*

H The applicant was the registered owner of a plot of land (Lot 16994). The category of land use of Lot 16994 was ‘building’ and the express condition imposed was ‘commercial building’. However, Lot 16994 had been wrongly zoned as open space under the Local Plan. This fact was corroborated by the state planning authority for the State of Selangor which confirmed that Lot 16994 is for commercial use and not an open space. The Petaling District Land Office also confirmed that Lot 16994 could not be gazetted as open space as it was not state land. The applicant had at all times paid the quit rent and assessment rates based on the category of land use for commercial purposes. However, the applicant’s application for planning permission to change the use

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Lot 16994 (change of zoning) from open space to commercial use was rejected by the second respondent on the ground that it did not conform with the local plan. The applicant's appeal to the first respondent was dismissed predicated on two grounds: (i) that the 'use' condition in a land title does not prevail over the land use zoning in a zoning plan; and (ii) that the second respondent had no power to grant an application for a change or amendment of zoning. Hence this application for judicial review of the first respondent's decision. The principal issue that fell to be determined was whether the respondents had misconstrued and misapplied s 108 of the National Land Code ('NLC').

Held:

- (1) Section 108 NLC provides, inter alia, that whenever there is a conflict between the condition under the NLC and any restriction imposed by the local authority or local planning authority, the condition shall prevail. The word 'condition' appearing in s 108 refers to the express condition under s 104 of the NLC. In this case, it referred to the express condition 'commercial building'. The word 'restriction' appearing in s 108 of the NLC should be construed as a restriction imposed by the local authority or planning authority upon the owner of the land. And to the extent the restriction is inconsistent with the express condition in the register document of title, the restriction shall not have any effect (see paras 35–37).
- (2) The zoning of Lot 16994 as an open space was a restriction in the sense that it limited the use and enjoyment of Lot 16994. The restriction was inconsistent with the express condition 'commercial building' attached to Lot 16994. There was an obvious conflict between the express condition in the register document of title and the local plan. Section 108 NLC is patently clear. Any by-law or restriction imposed by any local or planning authority shall to the extent of any inconsistency with the express condition of the land be void (see paras 38–40).
- (3) Further, s 18(3) of the Town and Country Planning Act 1976 ('TCPA') also expressly provides that s 18(1) shall not affect the continuance of the use of any land for the purposes for which and to the extent to which it was lawfully being used prior to the date when a local plan first came into effect. Since the land use zoning of Lot 16994 under the local plan conflicted with the land use category and the express condition imposed under the NLC, the respondents when considering the planning application ought to have taken s 18(3) of the TCPA into account and disregarded the land use zoning under the local plan (see para 42).
- (4) The respondents failed to consider the fact that Lot 16994 was wrongly zoned as open space under the local plan in clear contravention of the land use and express condition. The first respondent also failed to have due regard to s 108 of the NLC and to the express condition in the

- A register document of title of Lot 16994. In denying the applicant the planning application, the respondent had effectively decided that the applicant cannot develop a land which has been designated for commercial use. Further, the first respondent erred when it concluded that the use condition in a land title does not prevail over the land use
- B zoning under the local plan; which error was glaringly obvious in the light of the expressed provisions of s 108 of the NLC. Hence, the first respondent had committed an error of law thereby rendering its decision illegal and bad in law (see para 57).

C **[Bahasa Malaysia summary]**

- Pemohon merupakan pemilik berdaftar sebidang tanah (Lot 16994). Kategori kegunaan tanah Lot 16994 adalah 'building' dan syarat nyata yang dikenakan adalah 'commercial building'. Walau bagaimanapun, Lot 16994 telah
- D dizonkan dengan salah sebagai ruang terbuka di bawah Pelan tempatan. Fakta ini disokong oleh Pihak Berkuasa Perancangan Negeri Selangor yang mana mengesahkan bahawa Lot 16994 adalah untuk kegunaan komersial dan bukan ruang terbuka. Pejabat Tanah Daerah Petaling juga mengesahkan bahawa Lot 16994 tidak boleh diwartakan sebagai ruang terbuka memandangkan ia
- E bukanlah tanah negeri. Pemohon pada setiap masa matan membayar kadar cukai tanah dan taksiran berdasarkan kategori kegunaan tanah untuk tujuan komersial. Walau bagaimanapun, permohonan pemohon untuk kebenaran perancangan untuk mengubah kegunaan Lot 16994 (penukaran zon) daripada ruang terbuka kepada kegunaan komersial telah ditolak oleh responden kedua
- F atas dasar bahawa ia tidak mematuhi pelan tempatan. Rayuan pemohon kepada responden pertama telah ditolak berdasarkan dua alasan: (i) bahawa syarat 'use' pada hak milik tanah tidak mengatasi kegunaan tanah zon di dalam pelan zon; dan (ii) bahawa responden kedua tidak mempunyai kuasa untuk membenarkan permohonan untuk penukaran atau pindaan zon. Justeru permohonan untuk semakan kehakiman terhadap keputusan responden pertama. Isu utama yang harus ditentukan adalah sama ada
- G responden-responden telah salah tafsir dan menggunakan dengan salah s 108 Kanun Tanah Negara ('KTN').

H **Diputuskan:**

- (1) Seksyen 108 KTN memperuntukkan, antara lain, bahawa apabila terdapat konflik antara syarat di bawah KTN dan mana-mana sekatan yang dikenakan oleh pihak berkuasa tempatan atau pihak berkuasa perancangan, syarat tersebut mengatasi sekatan tersebut. Perkataan
- I 'condition' yang wujud di dalam s 108 merujuk kepada syarat nyata di bawah s 104 KTN. Dalam kes ini, ia merujuk kepada syarat nyata 'commercial building'. Perkataan 'sekatan' yang wujud di dalam s 108 KTN seharusnya ditafsirkan sebagai sekatan yang dikenakan oleh pihak berkuasa tempatan atau pihak berkuasa perancangan terhadap pemilik

- tanah. Dan di mana sekatan adalah tidak konsisten dengan syarat nyata di dalam daftar dokumen hak milik, sekatan tersebut tidak mempunyai apa-apa kesan (lihat perenggan 35–37). A
- (2) Pengezonan Lot 16994 sebagai ruang terbuka adalah sekatan dalam erti kata ia mengehadkan penggunaan dan nikmat Lot 16994. Sekatan adalah berlawanan dengan syarat nyata ‘commercial building’ yang terikat pada Lot 16994. Terdapat konflik yang jelas antara syarat nyata di dalam daftar dokumen hak milik dan plan tempatan. Seksyen 108 KTN terang-terangan sangat jelas. Mana-mana undang-undang kecil atau sekatan yang dikenakan oleh mana-mana pihak berkuasa tempatan atau perancangan yang mana berlawanan dengan syarat nyata adalah terbatal (lihat perenggan 38–40). B
- (3) Selanjutnya, s 18(3) Akta Perancangan Bandar dan Negeri (‘APBN’) memperuntukkan bahawa s 18(1) tidak akan menjejaskan penggunaan apa-apa tanah untuk tujuan-tujuan di mana ia dengan sah telah digunakan sebelum tarikh plan tempatan berkuat kuasa. Memandangkan pengezonan kegunaan tanah Lot 16994 di bawah plan tempatan bercanggah dengan kategori kegunaan tanah dan syarat nyata yang dikenakan oleh KTN, responden-responden apabila mempertimbangkan permohonan perancangan seharusnya mengambil kira s 18(3) APBN dan mengetepikan pengezonan kegunaan tanah di bawah plan tempatan (lihat perenggan 42). C
- (4) Responden gagal untuk mempertimbangkan fakta bahawa Lot 16994 yang telah disalah zon sebagai ruang terbuka di bawah plan tempatan dengan jelas berlawanan dengan kegunaan tanah dan syarat nyata. Responden pertama juga gagal untuk mengambil kira s 108 KTN dan syarat nyata di dalam daftar dokumen hak milik Lot 16994. Dengan menafikan permohonan perancangan pemohon, responden dengan efektif telah memutuskan bahawa pemohon tidak boleh memajukan tanah yang dikhaskan untuk kegunaan komersial. Selanjutnya, responden pertama telah terkhilaf apabila memutuskan bahawa syarat kegunaan hakmilik tanah tidak mengatasi kegunaan tanah zon di bawah plan tempatan; yang mana merupakan kesilapan yang sangat jelas melihatkan peruntukan nyata s 108 KTN. Justeru, responden pertama telah terkhilaf dalam undang-undang yang mana menjadikan keputusannya tidak sah dan tidak betul dari segi undang-undang (lihat perenggan 57).] D
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Notes

For cases on application for planning permission, see 10 *Mallal's Digest* (4th Ed, 2013 Reissue) paras 203–204.

A Cases referred to

Andrew Lee Siew Ling v United Overseas Bank (M) Bhd [2013] 1 MLJ 449, FC (consd)

Anisminic Ltd v The Foreign Compensation Commission and Another [1969] 1 All ER 208, HL (consd)

B *Associated Provincial Picture Houses, Limited v Wednesbury Corporation* [1948] 1 KB 223, CA (refd)

B Surinder Singh Kanda v The Government of the Federation of Malaya [1962] 1 MLJ 169, PC (refd)

C *Chin Choy & Ors v Collector of Stamp Duties* [1979] 1 MLJ 69, FC (refd)

Chiu Wing Wa & Ors v Ong Beng Cheng [1994] 1 MLJ 89, SC (refd)

Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal [1996] 1 MLJ 481, CA (refd)

Kumpulan Perangsang Selangor Bhd v Zaid bin Hj Mohd Noh [1997] 1 MLJ 789; [1997] 2 CLJ 11, FC (refd)

D *Lau Keen Fai v Lim Ban Kay @ Lim Chiam Boon & Anor* [2012] 2 MLJ 8; [2012] 1 CLJ 577, FC (refd)

Magor and St Mellons RDC v Newport Corpn [1952] AC 189, HL (refd)

Manokaram all Subramaniam v Ranjid Kaur a/p Nata Singh [2009] 1 MLJ 21, FC (refd)

E *Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd* [2002] 1 MLJ 385; [2002] 1 CLJ 645, FC (refd)

Menara PanGlobal Sdn Bhd v Arokianathan all Sivapiragasam [2006] 3 MLJ 493, CA (refd)

F *Metramac Corp Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd* [2006] 4 MLJ 113, FC (refd)

Michael Lee Fook Wah v Minister of Human Resources Malaysia & Anor [1998] 1 MLJ 305, CA (refd)

Minister of Labour, Malaysia v Lie Seng Fatt [1990] 2 MLJ 9, SC (refd)

G *Muhammad Hilman bin Idham & Ors v Kerajaan Malaysia & Ors* [2011] 6 MLJ 507, CA (refd)

NKM Holdings Sdn Bhd v Pan Malaysia Wood Bhd [1987] 1 MLJ 39, SC (refd)

Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd [1979] 1 MLJ 135, FC (consd)

H *Petroliam Nasional Bhd v Nik Ramli Nik Hassan* [2004] 2 MLJ 288; [2003] 4 CLJ 625, FC (refd)

PP v Tan Tatt Eek & Other Appeals [2005] 2 MLJ 685; [2005] 1 CLJ 713, FC (refd)

Quah Swee Khoon v Sime Darby Bhd [2000] 2 MLJ 600; [2000] 2 AMR 2265, CA (refd)

I *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145, FC (refd)

Ramachandran Appalanaidu & Ors v Dato Bandar Kuala Lumpur & Anor [2010] MLJU 1120; [2008] R1-25-137 of 2008 (unreported) (refd)

- Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1; [2010] 8 CLJ 1, FC (refd) **A**
- Rohana bte Ariffin & Anor v Universiti Sains Malaysia* [1989] 1 MLJ 487; [1988] 2 CLJ Rep 390 (refd)
- Sri Bangunan Sdn Bhd v Majlis Perbandaran Pulau Pinang & Anor* [2007] 6 MLJ 581, FC (refd) **B**
- Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah & Anor* [1998] 3 MLJ 289; [1998] 3 CLJ 85, CA (refd)
- Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261 (refd) **C**
- Teh Bee v K Maruthamuthu* [1977] 2 MLJ 7, FC (refd)
- Trustees of the Kheng Chiu Tin Hou Kong and Burial Ground v Collector of Land Revenue (Housing and Development Board)* [1992] 1 SLR 425, CA (folld)
- Vengadasalam v Khor Soon Weng & Ors* [1985] 2 MLJ 449, SC (refd)
- Venkateswara Sdn Bhd v Datuk Bandar Kuala Lumpur* [2002] 8 CLJ 997, HC (refd) **D**
- Warburton v Loveland d Ivie* (1832) 2 Dow & CI 480, HL (refd)
- Woodward v Watts* 2 E & B 452 (refd)
- Yeo Peck Chie v KS Gill & Co* [1946] 1 MLJ 131 (refd) **E**
- Legislation referred to**
- Courts of Judicature Act 1964 s 25(2)
- Federal Constitution Part II
- Interpretation Acts 1948 and 1967 s 17A
- National Land Code ss 52(1), 89, 104, 108, 120, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134 **F**
- Planning Act (Cap 232) [SG]
- Rules of Court 2012 O 53 r 2(2)
- Specific Relief Act 1950 s 44
- Town and Country Planning Act 1976 ss 16(1), (3), 18(1), (3), 21, 23(1) **G**
- Sofiah Omar (Kamaruzaman Arif Amran & Chong) for the appellant.*
- B Thangaraj (Thangaraj & Associates) for the respondents.*
- Vernon Ong J:** **H**

[1] On 2 May 2013, the court made an order of certiorari to quash the decision of the Lembaga Rayuan Negeri Selangor ('first respondent') dismissing the applicant's appeal against the decision of the Majlis Bandaraya Petaling Jaya ('second respondent') and an order of mandamus to compel the second respondent to consider applicant's application for planning permission to change the land use from open space to commercial use. The grounds of the decision are as follows: **I**

A THE BACKGROUND OF PERTINENT FACTS

B [2] The applicant is the registered owner of a piece of land held under HSD 39442 Lot PART 16994, Mukim Damansara Daerah Petaling Jaya, Selangor located in SS1, Kg Tunku, Petaling Jaya ('Lot 16994'). Lot 16994 has freehold tenure and the category of land use is 'Building' subject to the express condition 'Commercial Building'.

C [3] The second respondent having mistaken Lot 16994 for a public open space had inadvertently placed such facilities as benches and rubbish bins on the site. In fact, Lot 16994 was *gazetted* in June 2007 as an open space under the local plan 'Rancangan Tempatan Petaling Jaya (Pengubahan 1)' ('the local plan').

D [4] In response to an enquiry from Koperasi Pegawai-Pegawai Kerajaan (KPPK) the previous owner of Lot 16994, Jabatan Perancangan Bandar dan Desa ('JPBD') by letter dated 2 December 2009 confirmed that Lot 16994 is not an open space. The relevant portions in JPBD's letter are as follows:

E 3 Sehubungan dengan itu, Jabatan ini tiada halangan terhadap pembangunan yang dicadangkan di atas lot 16994 untuk kegunaan klinik sahaja.

F 3.1 Walau bagaimanapun, semua lot-lot tanah yang ditunjukkan sebagai kawasan lapang dalam rancangan tempatan tersebut (kecuali lot 16994) mestilah diserahkan kepada kerajaan untuk diwartakan sebagai kawasan lapang.

G [5] That Lot 16994 had been mistakenly zoned as open space during the preparation of the local plan was also confirmed by the Pejabat Daerah Tanah Petaling under a letter dated 30 March 2009 to KPPK. The pertinent portion of the letter reads as follows:

H 2 Berdasarkan rekod Pentadbiran ini, didapati bahawa kedua-dua tanah milik KPPKMB tersebut diatas belum pernah diwartakan sebagai kawasan lapang. Untuk makluman tuan, hanya tanah kerajaan sahaja yang boleh diwartakan di bawah Seksyen 62, Kanun Tanah Negara.

I [6] On 7 September 2010, the applicant entered into a sale and purchase agreement with KPPK. The ownership of Lot 16994 was subsequently in favour of the applicant.

[7] The applicant has paid and continues to pay the quit rent and assessment rates for Lot 16994 based on the land use of 'building' and express condition of 'commercial'.

[8] In 2011, the applicant submitted a planning application under s 21 of the Town and Country Planning Act 1976 ('TCPA 1976') for planning permission for a material change of the land use and to develop a five-storey building with a requisite layout plan and development proposal report to the second respondent. The applicant also enclosed letters of support/approvals from the Pejabat Daerah dan Tanah Petaling, Jabatan Alam Sekitar Negeri Selangor, Lembaga Urus Air Selangor, Agensi Perakuan Pambetungan Indah Water Konsortium Sdn Bhd, Syarikat Bekalan Air Selangor Sdn Bhd and Tenaga Nasional Bhd.

A

B

[9] By a letter (Borang C(2)) dated 5 January 2012, the second respondent rejected the planning application. The rejection is premised on the principal ground that the planning application does not conform with the local plan; the relevant portion of the letter reads as follows:

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Pihak Berkuasa Perancangan Tempatan telah menolak Kebenaran Merancang di atas kerana bercanggah dengan Rancangan Tempatan Petaling Jaya 1 (Pengubahan 1).

D

[10] In that same letter, the second respondent also informed the applicant that an appeal against its decision may be made to the first respondent pursuant to s 23(1) of the TCPA 1976.

E

[11] On 3 February 2012, the applicant lodged an appeal with the first respondent against the decision of the second respondent in refusing to grant planning permission.

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[12] The first respondent dismissed the applicant's appeal on 5 September 2012. In the grounds of its decision, the first respondent concluded as follows:

(1) That s 108 of the National Land Code does not apply to the local plan prepared under the Town and Country Planning Act 1976, and therefore, does not apply to the zoning plan prepared therein, and that being so, the use condition in a land title does not prevail over the land use zoning in a zoning plan.

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(2) That the Local Planning Authority, as prescribed under s 16(1) and (3) of the Town and Country Planning Act 1976, has no powers to grant an application for a change or amendment of zoning and that, therefore, an application for a 'material change of use' is not the proper form of application for an amendment to the land use zoning of the local plan.

H

I

THE DECISION OF THE COURT

[13] In this case, the applicant's application for planning permission to

- A change the use of land (change of zoning) from open space to commercial use was rejected by the second respondent on the ground that it does not conform with the local plan.
- B [14] The applicant's appeal to the first respondent was dismissed. The first respondent's decision is predicated upon two grounds — (i) that 'the use condition in a land title does not prevail over the land use zoning in a Zoning Plan'; and (ii) that the second respondent has no power to grant an application for a change or amendment of zoning.
- C [15] By reason of the aforesaid, the principal issue that falls to be determined is whether the first and second respondents have misconstrued and misapplied or misstated s 108 of the National Land Code ('NLC').
- D [16] To start with, so much of the following facts are undisputed.
- [17] Firstly, the category of land use of Lot 16994 is 'Building' and the express condition imposed is 'Commercial Building'.
- E [18] Secondly, Lot 16994 is not state land; the registered owner of Lot 16994 is the applicant.
- [19] Thirdly, Lot 16994 has been zoned as open space under the local plan.
- F [20] Fourthly, Lot 16994 has been wrongly zoned as open space. This fact is corroborated by two independent bodies — (i) the state planning authority for the State of Selangor ('JPBD') vide letter dated 2 December 2009 confirming that Lot 16994 is for commercial use and not an open space; and (ii) Petaling District Land Office (Pejabat Daerah Tanah Petaling) vide letter dated 30 March 2009 confirming that Lot 16994 cannot be *gazetted* as open space as it is not state land.
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- H [21] Fifthly, since Lot 16994 was alienated to the applicant, the applicant has paid the quit rent and assessment rates based on the category of land use for commercial purposes. Even after the local plan was *gazetted*, the applicant was required to and did continued to pay the quit rent and assessment rates based on the category of land use for commercial purposes.
- I [22] In the particular circumstances of this case, the issue is whether the first respondent was correct in holding that s 108 NLC cannot override land use zoning prepared under the local plan. In essence, the land use category (commercial building) for Lot 16994 and the zoning restrictions under the RTPJ1 ('open space') are at obviously variance with each other. What is the

effect of this conflict? In order to consider whether the land use category or the zoning restriction prevails, it is necessary to examine the nature of the land use category in the register document of title.

A

Conclusiveness of the land register

B

[23] The NLC stipulates that every register document of title shall, inter alia, be conclusive evidence of the conditions, restrictions in interest and other provisions subject to which the land is for the time being held by that person or body (s 89 of the NLC).

C

[24] According to a learned text on Malaysia land law, s 89 of the NLC embodies the 'curtain' and 'mirror' principles that persons dealing with the registered proprietor of the land can safely act on the information presented on the register and that it is not necessary to go behind the register in order to ascertain the validity of the information obtained thereon (Teo Keang Sood and Khaw Lake Tee, *Land Law in Malaysia — Cases and Commentary*, (2nd Ed), Butterworths Asia).

D

[25] Consequently, a registered proprietor of a piece of land possesses an indefeasible title to or interest in the land and can use the land for the purposes for which the land has been alienated. The principle that under the Torrens system the register is everything was reiterated by the Federal Court in *Teh Bee v K Maruthamuthu* [1977] 2 MLJ 7.

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Categories and effect of land use

[26] There are only three main categories of land use prescribed under the NLC (s 52(1) of the NLC). They are:

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- (a) agriculture;
- (b) building; and
- (c) industry.

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[27] The effect of the categorisation of land use is to enable the state authority to achieve planned development (Judith Sihombing, *The National Land Code a Commentary*, Lexis Nexis at paras 1355–1400). In this context, it has also been suggested that the control of land use in the NLC had placed the state authority in a stronger position to allow public control of planning land use (David SY Wong, *Tenure and Land Dealings in the Malay States*, Singapore University Press at p 94).

I

A *Express condition under NLC — effect of*

[28] The applicant's argument turns on the fact that Lot 16994 is also subject to the express condition 'Commercial Building'. What is an express condition and what is the effect of the express condition? An express condition is a condition that is attached to any land that is alienated by the state authority to a person or body (s 120 of the NLC). An express condition that is imposed on any land shall run with the land and binds the registered proprietor of the land (s 104 of the NLC). It follows that the express condition 'Commercial Building' imposed on Lot 16994 shall run with Lot 16994 and bind the applicant qua registered proprietor.

[29] It is in the interest of a registered proprietor of land to ensure that the land use and express condition imposed on his land is complied with completely. Should there be any breach of condition of the land use and express condition the land shall be liable to be forfeited (ss 125 to 134 NLC).

Conflict with local by-laws

[30] The key to the determination of the issue depends on the interpretation of s 108 of the NLC which reads as follows:

108 Conflict with local by-laws, etc.

Where any land affected by any by-law of, or restriction imposed by, any local authority or planning authority becomes subject by virtue of this Act to any condition which is inconsistent therewith, the condition shall prevail, and the by-law or restriction shall, to the extent of the inconsistency, cease to apply to the land, (emphasis added)

[31] The second respondent's argument is simply that s 108 of the NLC does not apply in this case as it caters for a situation where there is already a restriction imposed by a planning authority and the land subsequently becomes subject to any inconsistent condition imposed under the NLC (*Lau Keen Fai v Lim Ban Kay @ Lim Chiam Boon & Anor* [2012] 2 MLJ 8; [2012] 1 CLJ 577; *Ramachandran Appalanaidu & Ors v Dato Bandar Kuala Lumpur & Anor* [2010] MLJU 1120; [2008] R1-25-137 of 2008)

Statutory interpretation — principles

[32] In construing a statute effect must be given to the object and intent of the legislature in enacting the statute. Accordingly, the duty of the court is limited to interpreting the words used by the Legislature and to give effect to the words used by it. The court will not read words into a statute unless clear reason for it is to be found in the statute itself (see *NKM Holdings Sdn Bhd v Pan*

Malaysia Wood Bhd [1987] 1 MLJ 39 (SC); *Metramac Corp Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd* [2006] 4 MLJ 113 (FC); *Vengadasalam v Khor Soon Weng & Ors* [1985] 2 MLJ 449 (SC); *Sri Bangunan Sdn Bhd v Majlis Perbandaran Pulau Pinang & Anor* [2007] 6 MLJ 581 (FC)). Therefore, in construing any statutes, the court will firstly, look at the words in the legislation and apply the plain and ordinary meaning of the words in the statute. If there is any ambiguity to the words used, the court is duly bound to accept it even if it may lead to mischief. But where the language used is clear and unambiguous, it is not the function of the court to rewrite the statute in a way which it considers reasonable. But if the words employed are not clear, then the court may adopt the purposive approach in construing the meaning of the words used (see *Public Prosecutor v Tan Tatt Eek & Other Appeals* [2005] 2 MLJ 685; [2005] 1 CLJ 713; *Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd* [2002] 1 MLJ 385; [2002] 1 CLJ 645; *Chin Choy & Ors v Collector of Stamp Duties* [1979] 1 MLJ 69; *Yeo Peck Chie v KS Gill & Co* [1946] 1 MLJ 131; *Magor and St Mellons RDC v Newport Corpn* [1952] AC 189 (HL); *Woodward v Watts* 2 E & B 452; and *Warburton v Loveland d Ivie* (1832) 2 Dow & CI 480).

[33] In *Manokaram a/l Subramaniam v Ranjid Kaur a/p Nata Singh* [2009] 1 MLJ 21 (FC), Ariffin Zakaria FCJ (later CJ) held that the fundamental rule of interpretation is that a statute is to give effect to the intent of the Legislature, and that intention has to be found by an examination of the language used in the statute as a whole. Where the Legislature uses different language in the same connection, in different parts of the statute, it is presumed that a different meaning and effect is intended, and if different language is used in contiguous provisions, it must be presumed to have done so designedly. Where the statute has an ordinary and natural meaning, the court has a duty to enforce that meaning even if the result is inconvenient, impolite or improbable.

[34] In *Andrew Lee Siew Ling v United Overseas Bank (M) Bhd* [2013] 1 MLJ 449 (FC), the Federal Court enunciated on the application of s 17A of the Interpretation Acts 1948 and 1967 which provides for a purposive approach in the interpretation of statutes. Zulkefli CJ (Malaya) speaking for the Federal Court had this to say at pp 457–458:

Section 17A of the Interpretation Acts provides that:

A construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote the purpose or object.

On the proper application of the provision of the said s 17A of the Interpretation Act we would refer to the case of *All Malayan Staff Union v Rajasegaran & Ors* [2006] 6 MLJ 97 wherein the court had laid down the principles, inter alia, as follows:

- A In summarizing the principles governing the application of the purposive approach to interpretation, *Craies on Legislation* (8th Ed), says at p 566:
- (1) *Legislation is always to be understood first in accordance with its plain meaning.*
- B (2) *Where the plain meaning in doubt the court will start the process of construction by attempting to discover, from the provisions enacted, the broad purpose of the legislation.*
- (3) *Where a particular reading would advance the purpose identified, and would do no violence to the plain meaning of the provisions enacted, the courts will be prepared to adopt that reading.*
- C (4) Where a reading would advance the purpose identified but would strain the plain meaning of the provisions enacted, the results will depend on the context and, in particular, on a balance of the clarity of the purpose identified and the degree of strain on the language.
- D (5) Where the courts conclude that the underlying purpose of the Legislation is insufficiently plain, or cannot be advanced without any unacceptable degree of violence to the language used, they will be obliged, however regretfully in the circumstances of a particular case, to leave to the legislature the task of extending or modifying the legislation.
- E The choice prescribed in s 17A of ‘... a construction that would promote the purpose or object underlying the Act ... shall be preferred to a construction that would not promote that purpose or object...’ can only arise when the meaning of a statutory provision is not plain and is ambiguous. If therefore, the language of a provision is plain and unambiguous s 17A will have no application as the question of another meaning will not arise. *Thus, it is only when a provision is capable of bearing two or more different meanings can s 17A be resorted to in order to determine the one that will promote the purpose or object of the provision. Such an exercise must be undertaken without doing any violence to the plain meaning of the provision. This is a legislative recognition of the purposive approach and is in line with the current trend in statutory interpretation. The principles set out in the preceding paragraphs will therefore be relevant to the operation of s 17A.* (Emphasis added.)
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[35] Section 108 of the provides, inter alia, that whenever there is a conflict between the condition under the NLC and any restriction imposed by the local authority or local planning authority, the condition shall prevail. The word ‘condition’ appearing in s 108 refers to the express condition under s 104 of the NLC. In this case, it refers to the express condition ‘Commercial Building’

- I [36] Section 108 of the NLC makes explicit reference to two types of conflict — (i) ‘any by-law’; and (ii) ‘any restriction.’ What is the meaning of the word ‘restriction’ within the context of s 108 of the NLC? Whilst the word ‘restriction’ has not been defined in any written law, in its widest sense it refers to a limitation on the use or enjoyment of something, in this case land in its widest sense. According to Anandan Krishnan, *Words, Phrases & Maxims*

Legally and Judicially Defined Lexis Nexis the word ‘restriction’ means statutory restrictions and also planning restrictions in so far as they may legitimately be taken into account in determining whether or not to approve or reject an application to develop land in conformity with the Planning Act (Cap 232) and rules and regulations made thereunder (*Trustees of the Kheng Chiu Tin Hou Kong and Burial Ground v Collector of Land Revenue (Housing and Development Board)* [1992] 1 SLR 425 at p 435).

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[37] Applying the above principles, the word ‘restriction’ appearing in s 108 of the NLC should be construed as a restriction imposed by the local authority or planning authority upon the owner of the land. And to the extent the restriction is inconsistent with the express condition in the register document of title, the restriction shall not have any effect.

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[38] In this case, Lot 16994 has been zoned as an open space under the local plan. The zoning of Lot 16994 as an open space is a restriction in the sense that it limits the use and enjoyment of Lot 16994. The restriction is also inconsistent with the express condition ‘Commercial Building’ attached to Lot 16994?

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[39] Herein lies the crux of the matter. There is an obvious conflict between the express condition in the register document of title and the local plan. The first respondent contends that the use condition in a land does not prevail over the land use zoning under the local plan. The local plan is an administrative act performed by the second respondent under the provisions of the TCPA 1976.

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[40] The NLC is a complete code relating to land law in Malaysia. Section 108 of the NLC is patently clear. Any by-law or restriction imposed by any local or planning authority shall to the extent of any inconsistency with the express condition of the land be void.

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[41] In *Venkateswara Sdn Bhd v Datuk Bandar Kuala Lumpur* [2002] 8 CLJ 997, the High Court held that where there is a conflict between the provisions of the NLC and local planning laws, the provisions of the NLC shall prevail. In order to determine whether the provisions of the NLC or the TCPA 1976 should prevail, the court should look to see if there is any expressed provision in the NLC to exclude the application of the TCPA 1976 and vice versa (*Chiu Wing Wa & Ors v Ong Beng Cheng* [1994] 1 MLJ 89 (SC)).

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[42] In this instance, the expressed provision of s 108 NLC provides that the express condition in the register document of title shall prevail over any restriction imposed under the local plan. Further, s 18(3) of the TCPA 1976 also expressly provides that sub-s (1) of s 18 shall not affect the continuance of the use of any land for the purposes for which and to the extent to which it was

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- A lawfully being used prior to the date when a local plan first came into effect. Since the land use zoning of Lot 16994 under the local plan conflicts with the land use category and the express condition imposed under the NLC, the respondents when considering the planning application ought to have taken s 18(3) of the TCPA 1976 into account and disregarded the land use zoning under the local plan.
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JUDICIAL REVIEW IN MALAYSIA

- C [43] Judicial review is a branch of law dealing with administrative law. In its traditional sense, it refers to the exercise of the court's supervisory powers over the decisions of inferior tribunals and statutory bodies. The decisions are tested against established principles developed over time by the common law (see recent decision of the Court of Appeal in *Muhammad Hilman bin Idham & Ors v Kerajaan Malaysia & Ors* [2011] 6 MLJ 507).
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- [44] The powers of the High Court of judicial review is enshrined under the Specific Relief Act 1950 and the Courts of Judicature Act 1964 ('CJA 1964'); in particular the additional powers which are set out in para 1 of the Schedule to s 25(2) of the CJA 1964. It empowers the High Court to issue to any person of authority directions, orders or writs, including writs of the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any others, for the enforcement of the rights conferred by Part II of the Constitution. In fact, an application for judicial review may include a prayer for a declaration (O 53 r 2(2) of the ROC 2012). In the context of an application for judicial review of a decision of an inferior tribunal or statutory body, the court is usually called upon to make an order for mandamus, prohibition or certiorari. An order of certiorari has the effect of quashing a decision of a judicial or quasi-judicial authority with the intention of restraining any ultra vires exercise of powers. An order of mandamus is directed to private or municipal corporations, or to any of its officers, commanding the performance of a particular act or duty mandated by law (see s 44 of the Specific Relief Act 1950). An order of prohibition is directed only against a judicial or quasi-judicial authority in respect of proceedings before them.
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- H *Principles of judicial review*

- [45] At the outset it should also be noted that the remedy of judicial review is not concerned with reviewing the merits of the decision in which the application for judicial review is made. Instead, the remedy of judicial review is primarily a review of the decision making process. In performing this role the court is sitting in its supervisory jurisdiction and not in its appellate jurisdiction (*Michael Lee Fook Wah v Minister of Human Resources Malaysia & Anor* [1998] 1 MLJ 305). The court will not interfere with the exercise of any
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power or discretion which has been conferred on an inferior court, administrative tribunal or other public authority. However, the decision of the body may be quashed by an order of certiorari where (i) that body has acted without jurisdiction; or (ii) that body has exceeded its jurisdiction; or (iii) body has failed to comply with the rules of natural justice in a case where the rules are applicable; or (iv) there is an error of law on the face of the record or the decision is unreasonable in the *Wednesbury's* sense. In short, whether certiorari will lie to quash the decision which has already been made by that body depends not on the decision itself but on whether the decision was made ultra vires, unfairly or unjustly in the exercise of the discretion. In dealing with this application for judicial review there are fundamental principles to be applied within regard the principles enunciated by the Court of Appeal in a case involving a judicial review of an award of the Industrial Court are instructive. In *Menara PanGlobal Sdn Bhd v Arokianathan all Sivapiragasam* [2006] 3 MLJ 493 (CA) at p 511 Mohd Ghazali JCA (later FCJ) said:

From the authorities discussed above, I would think that in dealing with judicial review a judge should have the following principles, inter alia, in the forefront of his mind:

- (i) judicial review is not an appeal from a decision but a review of the matter in which the decision was made;
- (ii) the High Court is not entitled on an application for judicial review to consider whether the decision itself, on the merits of the facts, was fair and reasonable;
- (iii) the High Court through judicial review, should not introduce technicalities of the court of law to the Industrial Court; this would certainly be so as s 30(5) of the Act imposes a duty upon the Industrial Court to have regard to substantial merits of the case rather than to technicalities and it also requires the Industrial Court to decide a case in accordance with equity and good conscience;
- (iv) the main and only function of the Industrial Court in dealing with a reference under s 20 of the Act is to determine whether the misconduct or irregularities complained of by the management as to the grounds of dismissal were in fact committed by the workman and if so, whether such grounds constitute just cause or excuse for the dismissal.
- (v) the Industrial Court should not be burdened with the technicalities regarding standard of proof, the rules of evidence and procedure that are applied in the court of law;
- (vi) the High Court will not interfere with findings of fact by the Industrial Court unless the same are completely unsupported by evidence and further, will not interfere merely because it may come to different conclusions on facts on the basis of the same evidence; weighing and assessing the evidence of the witnesses is the function of the Industrial Court and not that of the High Court.

(Emphasis added.)

A [46] Against the backdrop of the Court of Appeal's decision in *Menara PanGlobal Sdn Bhd v Ariokianathan all Sivapiragasam*, in *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1 (FC) the Federal Court held that the distinction between review and appeal no longer holds. The principles to which a reviewing court should scrutinise included the following matters:

- B (a) the decision making process where the impugned decision is flawed on the ground of procedural impropriety;
- C (b) the merits where the decision is grounded on illegality or plain irrationality;
- (c) the findings where the facts do not support the conclusion arrived at by a tribunal; or
- D (d) the findings where the findings of the tribunal had been arrived at by taking into consideration irrelevant matters, and had failed to take relevant matters into consideration.

E [47] Be that as it may, the power to review a decision on its merits is not absolute. In cases involving public policy, national interest, public safety or national security, it may be inappropriate to go into the merits or otherwise of a decision during a judicial review application (*Kumpulan Perangsang Selangor Bhd v Zaid bin Hj Mohd Noh* [1997] 1 MLJ 789; [1997] 2 CLJ 11(FC); *Petroleum Nasional Bhd v Nik Ramli Nik Hassan* [2004] 2 MLJ 288; [2003] 4 CLJ 625(FC)).

F [48] In the light of the above cited authorities, it is settled law that there are three principal grounds upon which a court may review a decision of an inferior tribunal or statutory body. They are:

- G (a) Procedural impropriety;
- (b) Illegality; and
- (c) Irrationality.

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Procedural impropriety

I [49] This is a classic case of review of the decision-making process. It addresses the decision-making process to test for procedural fairness with reference to the context and applicable statutory provisions. It includes the right to be heard, the rule against bias and the requirement of prior notice of the decision so that the person affected by the decision will be in a position to make representations and to adequately prepare and answer the case against him.

There is also a duty of adequate disclosure. Whilst there must be a fair hearing, there is no general right of oral hearing. There is no general right to call witnesses or to cross-examine witnesses. There is also no general right to legal representation. Whilst there is also no general duty to give reasons, such failure to give reasons may give rise to the inference that there are no valid reasons for the decision. Further, there must be a real hearing. The decision maker cannot fetter its discretion by self-created rules of policy. The decision maker must be impartial and free from bias; the test for bias being absence of direct pecuniary interest (*B Surinder Singh Kanda v The Government of the Federation of Malaya* [1962] 1 MLJ 169; *Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah & Anor* [1998] 3 MLJ 289; [1998] 3 CLJ 85 (CA); *Rohana bte Ariffin & Anor v Universiti Sains Malaysia* [1989] 1 MLJ 487; [1988] 2 CLJ Rep 390).

Illegality

[50] This involves a review of the decision-making process, not the merits. This is a typical ground for the control of discretionary power. Classic examples of illegality include 'error of law' and 'excess of jurisdiction', abuse of power and Anisminic error. Under this head, the court will consider whether the public body in question had acted within the terms of power granted to it and within the bounds of the statutory purpose (*R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1; [2010] 8 CLJ 1). Decisions tainted with illegality may arise if a decision maker makes a decision for an extraneous purpose or improper motive or takes into consideration irrelevant factors and or fails to take into consideration relevant factors. The court must also be satisfied that the decision is not actuated by mala fide. The decision-making process must also not violate the rule against delegation of discretionary power or the rule against deciding on no evidence or making findings of fact with no rational evidential basis; though as a rule there is non-interference with the assessment of evidence, particularly testimonial evidence (*Minister of Labour, Malaysia v Lie Seng Fatt* [1990] 2 MLJ 9; *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal* [1996] 1 MLJ 481; *Quah Swee Khoon v Sime Darby Bhd* [2000] 2 MLJ 600; [2000] 2 AMR 2265).

[51] Lack of jurisdiction may arise in circumstances where a tribunal ask itself the wrong question; or take into account matters which it was not directed or required to take into account; or may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account (*Anisminic Ltd v The Foreign Compensation Commission and Another* [1969] 1 All ER 208, 213–214).

A *Irrationality*

[52] Under this ground, the issue is not whether the decision-maker strayed outside the purposes defined by the governing statute (the 'illegality' test), nor whether the decision was procedurally unfair (the 'procedural propriety' test).

B The question to be determined is whether the power under which the decision-maker acts, a power which normally confers a broad discretion has been improperly exercised. Therefore, a review under this ground extends beyond the process and to the substance or merits of the decision.

C [53] A decision which falls on this ground is said to have failed the 'Wednesbury unreasonableness' test (see *Associated Provincial Picture Houses, Limited v Wednesbury Corporation* [1948] 1 KB 223). This is a decision that is said to be so outrageous in its defiance of logic that no sensible person who had applied his mind to it could have arrived at it. It also involves a consideration

D of the principle of 'proportionality' *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261; *Kumpulan Perangsang Selangor Bhd v Zaid bin Hj Mohd Noh* [1997] 1 MLJ 789; [1997] 2 CLJ 11). It may also include decisions taken in bad faith, oppressively or based on considerations which have been accorded manifestly inappropriate weight, in addition to strictly irrational decisions which are illogical or arbitrary (*R Rama Chandran*).

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[54] The Federal Court adopted this principle in *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135 (FC). In that case the registered owner of a piece of freehold land (title in perpetuity) applied to the Federal Government for subdivision of the land and for conversion of the express condition relating to the use of a hotel for which planning permission had been granted. The registered owner was informed that the application would be approved on condition that after surrendering the land, the registered owner would receive back a lease of 99 years instead of title to the land in perpetuity. The registered owner applied to court for an order that the approving authority approve its application for subdivision upon the usual terms and conditions. The High Court gave judgment for the registered owner. On appeal the Federal Court held that the approving authority had no power to make the registered owner/applicant give up its freehold title and receive in exchange a 99 year lease. The condition was set aside. The condition in question which the registered owner objected to did not relate to the permitted development, it was unreasonable and was used for an ulterior object, the object being to bring developed land into line with newly alienated land as to which only leases not titles in perpetuity are granted. At p 146 Suffian LP reiterated the following principles:

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I am of the opinion that English cases afford principles that may be followed here. What are the principles? They are:

- (1) The approving authority does not have an uncontrolled discretion to impose whatever condition it likes.

- (2) The conditions, to be valid, must fairly and reasonably relate to the permitted development. A
- (3) The approving authority must act reasonably and planning conditions must be reasonable.
- (4) The approving authority is not at liberty to use its power for an ulterior object, however, desirable that object may seem to it in the public interest. B

In reconsidering these applications, the Committee should act fairly and not arbitrarily. There must be no bad faith and no dishonesty, though in fairness to everybody concerned nobody has suggested that on the part of the Committee. There must be no unreasonableness, no attention to extraneous circumstances, no disregard to public policy, and things of that sort — things mentioned by Lord Greene MR at p 682 in *Associated Provincial Picture House v Wednesbury Corporation*. C

[55] At p 148, Raja Azlan Shah Ag CJ (Malaya) (as HRH then was) said: D

.... On principle and authority, the discretionary power to impose such conditions 'as they think fit' is not an uncontrolled discretion to impose whatever conditions they like. In exercising their discretion, the planning authorities must, to paraphrase the words of Lord Greene M R in *Associated Provincial Picture House v Wednesbury Corporation* have regard to all relevant considerations and disregard all improper considerations, they must produce a result which does not offend against common sense; or to repeat Lord Denning MR's words in *Pyx Granite Co Ltd v Ministry of Housing and Local Government*, approved in *Fawcett Properties Ltd v Buckingham County Council* the conditions to be valid must fairly and reasonably relate to the permitted development. The dictum of Lord Denning M R has been frequently quoted and followed in these matters. See *R v Hillingdon Council, Ex parte Royco Homes Limited*. Lord Denning said (page 572): E

The principles to be applied are not, I think in doubt. Although the planning authorities are given very wide powers to impose 'such conditions as they think fit'. Nevertheless the law says that those conditions, to be valid, must fairly and reasonably relate to the permitted development. The planning authority are not at liberty to use these powers for an ulterior object, however desirable that object may seem to them to be in the public interest. F

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Every legal power must have legal limits, otherwise there is dictatorship. In particular, it is a stringent requirement that a discretion should be exercised for a proper purpose, and that it should not be exercised unreasonably. In other words, every discretion cannot be free from legal restraint; where it is wrongly exercised, it becomes the duty of the courts to intervene. The courts are the only defence of the liberty of the subject against departmental aggression. In these days when government departments and public authorities have such great powers and influence, this is a most important safeguard for the ordinary citizen: so that the courts can see that these great powers and influence are exercised in accordance with law. I would once again emphasise what has often been said before, that 'public G

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- A bodies must be compelled to observe the law and it is essential that bureaucracy should be kept in its place, (per Dankwerts L J in *Bradbury v London Borough of Enfield*.)
- B [56] The law on the doctrine of ultra vires is quite settled. In *Penang Development Corporation v Teoh Eng Huat*, Edgar Joseph Jr J enunciated the law in relation to ultra vires. The following passage bears reproduction:
- At pp 754–755:
- C I recognise that statutory corporations are subject to the doctrine of ultra vires. They are mere creatures of the statutes creating them, and the law will not suppose that they were created for any purpose other than those which induced the legislature to act (see *Harts's Introduction to the Law of Local Government and Administration* (8th Ed) at pp 292–293).
- D The doctrine of ultra vires as applied to statutory corporations has been well put by Lord Watson in *Baroness Wenlock & Ors v River Dee Company* thuswise at p 362:
- E Whenever a corporation is created by Act of Parliament, with reference to the purposes of the Act, and solely with a view of carrying these purposes into execution, I am of opinion not only that the objects which the corporation may legitimately pursue must be ascertained from the Act itself, but that the powers which the corporation may lawfully use in furtherance of these objects must either be expressly conferred or derived by reasonable implication from its provisions.
- F Unlike a natural person who can in general do whatever he pleases so long as what he does is not forbidden by law or contrary to law, a statutory corporation can do only those things which it is authorised to do by statute, directly or by implication. If such a corporation acts otherwise than in this way its acts are ultra vires. There must in all cases be statutory authority for what is done, and that authority must either be expressly given or reasonably inferred from the language of an Act of Parliament.
- G The doctrine, if strictly applied to statutory corporations, would greatly impede their activities and would require empowering legislation to be burdened to an impossible extent by detailed provisions. The courts have therefore held that a corporation may do not only those things for which there is expressed or implied authority, but also whatever is reasonably incidental to the doing of those things. As Lord Selbourne said in *Attorney General v Great Eastern Railway Co* at p 478:
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- I It appears to me to be important that the doctrine of ultra vires ... should be maintained. But I agree ... that this doctrine ought to be reasonably, and not unreasonably, understood and applied, and that whatever may fairly be regarded as incidental to, or consequential upon, those things which the legislature has authorised ought not (unless expressly prohibited) to be held by judicial construction, to be ultra vires.

However, this extension, to include powers fairly incidental to those expressly conferred, does not indirectly enable statutory corporations to evade the doctrine of ultra vires. When the question arises whether a power is fairly incidental to those expressly given by the incorporating statute, thought it must be determined reasonably, the courts will not strain the language of the statute to enable the corporation to engage in activities never contemplated by the legislature. Thus if a company is incorporated by statute to manufacture railway vehicles, it cannot engage in the construction of railway systems (see *Ashbury Railway Carriage & Iron Co Ltd v Riche*).

In *London County Council v Attorney General*, Lord Halsbury LC referred to *Ashbury Railway Carriage & Iron Co Ltd v Riche* and *Attorney General v Great Eastern Railway* and said: 'I think now it cannot be doubted that those two cases do constitute the law upon the subject.'

On the other hand, the tendency of the modern law is to show that the courts are more liberal in their interpretation of what is fairly incidental than was formerly the case (see *A-G v Crayford Urban District Council and Bell Houses Limited v City Wall Properties Ltd*), thus it has been held that the setting up of a department to undertake the provision of all the printing and stationery required by a borough council is fairly incidental to the purposes of a municipal corporation, and so not ultra vires (see *A-G v Smethwick Corp*). So also, the employment of a consultant rating surveyor to advise a rating authority on proposals under the Local Government Act 1948 was not ultra vires (see *Grainger v Liverpool Corp*).

And at p 756:

It follows that in the application of the doctrine of ultra vires there are then three issues: first, whether what is done is specifically authorised by statute; secondly, whether (if there be no specific authority) one can reasonably imply authority from the language of the statute; and thirdly, whether an act for which no such direct or implied authority is found is reasonably incidental to the carrying into effect of a statutory purpose (see *CA Cross Principles of Local Government Law* (4th Ed) pp 8–9).

THE CONCLUDING REMARKS

[57] The first respondent and the second respondent have failed to consider the fact that Lot 16994 was wrongly zoned as open space under the local plan in clear contravention of the land use and express condition. The first respondent had also failed to have due regard to s 108 of the NLC and to the express condition in the register document of title of Lot 16994. In denying the applicant the planning application, the respondent has effectively decided that the applicant cannot develop a land which has been designated for commercial use. Further, the first respondent erred when it concluded that the use condition in a land title does not prevail over the land use zoning under the local plan; which error is glaringly obvious in the light of the expressed provisions of s 108 NLC. On the facts as aforesaid, the first respondent has committed an error of law thereby rendering its decision illegal and bad in law.

A [58] For the foregoing reasons, the order of certiorari was issued quashing the first respondent's decision and mandamus granted to compel the second respondent to consider the applicant's planning application.

Order accordingly.

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Reported by Kanesh Sundrum

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